IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 22, 2005

STATE OF TENNESSEE v. THOMAS LEE PHILLIPS

Appeal from the Criminal Court for Campbell County
No. 11898 E. Shayne Sexton, Judge

No. E2004-00760-CCA-R3-CD - Filed August 3, 2005

A Campbell County jury convicted the defendant, Thomas Lee Phillips, of two counts of child endangerment and violation of the implied consent law by refusing to submit to drug/alcohol testing. *See* Tenn. Code Ann. §§ 55-10-414(1), -10-406(a)(3) (2004). On appeal, the defendant contests the sufficiency of the convicting evidence and the method of sentencing. Finding the evidence sufficient, we affirm but merge the two child endangerment convictions pursuant to the Double Jeopardy Clause. We also affirm the trial court's sentencing as modified by the merger of the child endangerment convictions, and we remand the judgment for the implied consent violation for correction and for entry of a lawful sanction.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed as Modified.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, JJ., joined.

Timothy P. Webb, Jacksboro, Tennessee, for the Appellant, Thomas Lee Phillips.

Paul G. Summers, Attorney General & Reporter; Seth P. Kestner, Assistant Attorney General; William Paul Phillips, District Attorney General; and Scarlett W. Ellis, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Viewed in the light most favorable to the state, the evidence at trial showed that Wendell Bailey, a Wackenhut Security employee assigned to the Y-12 Plant in Oak Ridge, Tennessee, was driving home after work on June 17, 2003. He took the Campbell County Caryville interstate exit, and he noticed a small compact vehicle parked on the side of the exit ramp. Mr. Bailey passed the vehicle, but when he stopped at the traffic light at the end of the ramp, he noticed that the previously stopped vehicle was behind him.

When the traffic light changed, the vehicle passed Mr. Bailey, and he described its travel as "going from one lane to the other across the center line back – the inner shoulder of the road back across through the outer shoulder of the road." Mr. Bailey used his cellular phone to call E-911, and he reported a possible driving-under-the-influence suspect. Mr. Bailey trailed the vehicle to the Jacksboro Wal-Mart where it pulled into the parking lot and stopped near the food center entrance. Mr. Bailey testified that along the way he saw the driver on two occasions "lean[] out of the vehicle [and] pour[] out some alcoholic beverage." Mr. Bailey identified the defendant as the driver of the vehicle.

Mr. Bailey testified that the defendant was not the lone occupant of the vehicle. Two small children were in the back seat of the vehicle.

Jacksboro Police Officer Bryan Parker was dispatched to investigate the suspected intoxicated driver. When he arrived at the Wal-Mart parking lot, he found the defendant and a child in the vehicle. The officer later learned that a female and a second child had also been in the vehicle. Both children were less than 13 years of age. Officer Parker described the defendant's speech as slurred, and the officer directed the defendant to exit the vehicle. The officer testified that the defendant had trouble getting out of the vehicle, was unsteady on his feet, had a strong odor of alcohol about his person, and appeared to have urinated in his pants. In response to questioning, the defendant said that he had "a few" to drink earlier. The defendant was given field sobriety tests, which he did not satisfactorily complete. Officer Parker arrested the defendant and requested that he submit to a blood alcohol analysis; the defendant refused to consent.

The state rested its case, and the first and only defense witness was the defendant's sister, Rosie Parsons. Ms. Parsons testified that she has four children, and on June 17 she drove to the defendant's home to ask that he accompany her to the store and take care of three of the children while she purchased groceries. Ms. Parsons testified that she was driving a vehicle that her brother, Carlos Phillips, owned and that she, not the defendant, drove to Wal-Mart. Ms. Parsons claimed that after parking the car, she asked the defendant to "fix [her] seat," and she and the children walked toward the store. Ms. Parsons stated that before entering the store, she turned and saw "the law behind the car." She returned to the vehicle to find out why the officer was questioning her brother. According to Ms. Parsons, she took the car keys with her when she headed toward the store.

On cross-examination, Ms. Parsons said that after she picked up the defendant at his residence, she drove to her cousin's home in Lake City. She claimed that from Lake City she drove to Wal-Mart and that her cousin followed in a separate vehicle. Ms. Parsons denied pulling off and stopping on the Caryville exit ramp, denied weaving in and out of traffic, and denied crossing the center line. She maintained that her cousin, who was driving a van, followed directly behind her. Ms. Parsons also denied pouring out beer as she was driving, and she stated that she did not drink alcohol.

Ms. Parsons' testimony regarding her children and why she asked the defendant to accompany her was confusing and disjointed. She first stated, for instance, that the ages of the three

children in the vehicle were three months, seven years, and eight years. She then related that one child was three months old, the second child was four years old, and the third child was seven years old. The state quizzed Ms. Parsons why she took the children with her once they arrived at Wal-Mart, inasmuch as she claimed that the defendant's job was to watch the children. Ms. Parsons gave an incomprehensible response.

In response to the state's questioning about the defendant's arrest, Ms. Parsons testified that she did not know what was happening when she saw that a police officer was questioning the defendant; she did not know why the officer had the defendant performing tests or even that the officer arrested the defendant for DUI. She said that she did not advise the officer that she had been driving the vehicle because the officer ordered her "to sit there and not say nothing" and because when he later interviewed her, he never asked her if she had been the driver.

Based on the evidence presented, the jury found the defendant guilty as charged of two counts of child endangerment and of refusal to submit to a drug and alcohol test. The trial court conducted a misdemeanor sentencing hearing after the jury was discharged. The defendant testified in connection with sentencing that he is employed at Intex Enterprise in Clinton and resides with his two children and the children's mother in Caryville. He is the sole source of support for the family. He was asked about his prior driving record that showed two convictions for driving with a revoked or suspended license. The defendant testified that the charges arose from an accident several years earlier and his failure to maintain liability insurance. The defendant maintained his innocence of the charged offenses.

The trial court sentenced the defendant to 11 months and 29 days at 75 percent for each Class A misdemeanor conviction, with 90 days to be served in the county jail. The sentences were ordered to run concurrently. The defendant was fined $1,000 for each child endangerment conviction.

The defendant filed a timely notice of appeal. He argues on appeal that the evidence is legally insufficient to support his convictions and that the sentences imposed were arbitrary and should be reversed.

Our standard of review of the defendant's evidence insufficiency claim is well settled. When an accused challenges the sufficiency of the evidence, an appellate court inspects the evidentiary landscape, including the direct and circumstantial contours, from the vantage point most agreeable to the prosecution. The reviewing court then decides whether the evidence and the inferences that flow therefrom permit any rational fact finder to conclude beyond a reasonable doubt that the defendant is guilty of the charged crime. *See* Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Duncan*, 698 S.W.2d 63, 67 (Tenn. 1985); *State v. Dykes*, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000).

In determining sufficiency of the proof, the appellate court does not replay and reweigh the evidence. *See State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Witness credibility, the weight and value of the evidence, and factual disputes are entrusted to the finder of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *Liakas v. State*, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956); *Farmer v. State*, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). Simply stated, the reviewing court will not substitute its judgment for that of the trier of fact. Instead, the court extends to the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences that may be drawn from the evidence. *See Cabbage*, 571 S.W.2d at 835.

As relevant to this case, the defendant was charged with and convicted of two counts of Class A misdemeanor child endangerment. A person commits child endangerment who operates or controls a vehicle on a public thoroughfare while under the influence of an intoxicant and "who at the time of the offense was accompanied by a child under thirteen (13) years of age." Tenn. Code Ann. § 55-10-414(1) (2004). In terms of the implied consent charge, an individual who refuses to submit to a test for the purpose of determining the alcohol or drug content of that person's blood and after being advised of the consequences, shall be charged and sanctioned by revocation of driving privileges. *Id.* § 55-10-406(a)(1), (3).

The defendant challenges his convictions and violation of the implied consent law on the basis that Mr. Bailey's testimony was not worthy of belief and that Ms. Parsons' testimony established that the defendant had not been driving the vehicle. This challenge must fail. Witness credibility is for the jury to assess, and a "jury verdict [of guilt] approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." *State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983). Our review must be confined to whether a rational fact finder could find guilt beyond a reasonable doubt. In this regard, the state's proof need not be "uncontroverted or perfect." *Id.*

The state presented testimony from an eyewitness, Mr. Bailey, who identified the defendant as the operator of the vehicle that was swerving all over the highway. Mr. Bailey's concern and call to E-911 led to the defendant's apprehension. Officer Parker's testimony detailed the multiple indicators of extreme intoxication exhibited by the defendant, who was in the driver's seat of the automobile. Moreover, the evidence was absolutely uncontradicted that children under the age of thirteen had been riding in the automobile. Last, the state introduced the implied consent form signed by the defendant acknowledging his refusal to submit to a blood alcohol test. This evidence is unquestionably legally sufficient to support the defendant's convictions and violation of the implied consent law.

Although the defendant does not challenge the fact that he received two child endangerment convictions arising out of the same period of driving, we believe that his convictions for two counts of child endangerment constitute plain error under the circumstances of this case. *See* Tenn. R. Crim. P. 52(b). The child endangerment statute prohibits a course of conduct – that of driving while intoxicated and accompanied by a child under age thirteen – as opposed to an

individual act or result. Consequently, a single episode of driving while intoxicated typically constitutes a single offense even though the driver was accompanied by more than one child. *See State v. Robert S. Neal*, No. M2001-00441-CCA-R3-CD, slip op. at 12 (Tenn. Crim. App., Nashville, Dec. 19, 2002); *State v. Ramsey*, 903 S.W.2d 709, 713 (Tenn. Crim. App. 1995).

The defendant in this case endangered more than one child simultaneously as they were both in the automobile with him. Therefore, we hold that the dual convictions violate the Double Jeopardy Clause and that the finding of guilt for the two offenses merge.

As we understand the defendant's sentencing complaint, he is attacking the trial court's failure to make specific references to the principles of sentencing and to enhancement and mitigating factors. Misdemeanor sentencing, however, is performed under guidelines that do not parallel those established for felony sentencing. That is, in felony sentencing, the trial court has an affirmative duty to state on the record, either orally or in writing, which enhancement and mitigating factors it found applicable and its findings of fact. Tenn. Code Ann. §§ 40-35-209(c), -210(f) (2003); *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998). In contrast, the misdemeanor sentencing statute only requires that the trial court consider the enhancement and mitigating factors when calculating the percentage of the sentence to be served "in actual confinement" prior to "consideration for work release, furlough, trusty status and related rehabilitative programs." Tenn. Code Ann. § 40-35-302(d) (2003); *Troutman*, 979 S.W.2d at 274.

The defendant is correct that the trial court did not make explicit findings of enhancement and mitigating factors; however, the court was not required to do so in this misdemeanor case. *Troutman*, 979 S.W.2d at 274. The lack of such findings is no basis for holding the trial court in error.

That said, the record does reflect a different kind of sentencing error. The judgment form for the defendant's violation of the implied consent law imposes a county jail sentence of 11 months and 29 days, with 90 days' incarceration and 75 percent service before eligibility for rehabilitative-related programs. The judgment further orders the defendant to obtain a GED, and it revokes the defendant's driver's license for three years.

Ordinarily, a violation of the implied consent law is not a criminal offense, and the sanction is revocation of the driver's license for one, two, or five years. *See* Tenn. Code Ann. § 55-10-406(a)(3) (2004). Only under limited circumstances, which are not present in this case, does a misdemeanor conviction result. *See id*. The trial court in this case was not authorized to impose an incarcerative sentence, nor does the implied consent statute authorize a three-year license revocation. Accordingly, on remand the trial court is directed to correct the judgment form for the implied consent violation to impose a lawful sanction.[1]

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[1] We discern some confusion in this state about whether the issue of a non-criminal violation of the implied consent law must be *or even may be* based upon a jury finding. We acknowledge statements in our caselaw that (continued...)

Now, having reviewed the defendant's claims on appeal, we affirm the merged judgment of conviction for child endangerment and the sentence therefor, and we affirm the implied consent violation but remand that judgment for correction to impose a lawful sanction.

JAMES CURWOOD WITT, JR., JUDGE

[1](...continued)
indicate that the determination is not a jury question. *See, e.g., State v. Michael Ray Swan,* No. M2000-00539-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App., Nashville, Apr. 27, 2001) ("Whether there was a violation of the implied consent law was not a jury question. Such a violation is not a criminal offense and may result only in a suspension of the license."); *State v. Cottrell,* 868 S.W.2d 673, 679 (Tenn. Crim. App. 1992) (Tipton, J., dissenting) ("[A] conviction or finding of guilt [pursuant to the implied consent law] by a jury is superfluous and invalid."). On the other hand, cases abound in which a jury apparently rendered an implied consent verdict, and no indication of impropriety was offered by the appellate court. *See, e.g., State v. Michael Trew,* No. E2003-01915-CCA-R3-CD, slip op. at 1 (Tenn. Crim. App., Knoxville, Nov. 17, 2004) ("The Defendant . . . was found guilty by jury verdict of . . . violating the implied consent law."); *State v. Terry Wayne Perkins,* No. E2003-02885-CCA-R3-CD, slip op. at 1 (Tenn. Crim. App., Knoxville, Aug. 17, 2004) ("A jury convicted him of violation of the implied consent law and driving on a revoked license."); *State v. Doyle Gilbert Newsom,* No. M2002-01696-CCA-R3-CD, slip op. at 1 (Tenn. Crim. App, Nashville, Dec. 23, 2003) ("Newsom[] was convicted by a Bedford County jury of fifth offense driving under the influence of an intoxicant, driving on a revoked driver's license, and violation of the implied consent law."); *State v. Taylor,* 70 S.W.3d 717 (Tenn. 2002) ("Defendant was convicted, after a jury trial in the Circuit Court . . . [of] violation of the implied consent law."); *State v. Gregory Keith Weaver,* No. 01C01-9705-CC-00188, slip op. at 2 (Tenn. Crim. App., Nashville, Aug. 18, 1998) ("The Defendant . . . appeals as of right from his convictions of DUI, . . . reckless driving, driving on a revoked license, . . . violating the open container law, and violating the implied consent law following a jury trial in the Montgomery County Criminal Court."); *State v. Tony D. Burton,* No. 01C01-9509-CC-00286, slip op. at 2 (Tenn. Crim. App., Nashville, Oct. 29, 1996) ("The appellant . . . was convicted by a jury of driving under the influence of an intoxicant, third offense, and violation of the implied consent law"); *State v. Daniel G. Hampton,* No. 03C-01-9503-CR-00107, slip op. at 1 (Tenn. Crim. App., Knoxville, July 3, 1996) ("The appellant . . . was convicted of driving under the influence, . . . two counts of driving on a revoked license, . . . and violation of the implied consent law by a jury of his peers."); *State v. David Roosevelt Shelton,* No. 01C01-9412-CC-00422, slip op. at 4 (Tenn. Crim. App., Nashville, Oct. 6, 1995) ("The initial issue presented by the appellant on appeal is that the evidence presented at trial was not sufficient to permit a rational jury to find the appellant guilty beyond a reasonable doubt of driving under the influence and violating the implied consent statute."); *State v. Dennie Ray Loden,* No. 03-C01-9303-CR-00082, slip op. at 2 (Tenn. Crim. App., Knoxville, Mar. 30, 1994) ("Dennie Ray Loden[] appeals the judgment of the trial court approving a jury verdict convicting him of . . . violation of the implied consent statute."); *State v. Malcolm Flake,* No. 13, slip op. at 5 (Tenn. Crim. App., Jackson, Mar. 5, 1986) ("The trial judge correctly charged the jury concerning the implied consent law."). *But see State v. Arthur Edward Chandler,* No. 01C01-9608-CC-00345, slip op. at 2 (Tenn. Crim. App., Nashville, Aug. 22, 1997) ("Following a jury trial in the Circuit Court . . ., the Defendant . . . was found by the trial court to be in violation of the implied consent law."). We point out this situation but see no compelling reason to resolve any extant conflict at this time.